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NO. 88-1120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Court of Appeals erred in upholding the trial court's decision that the 1986 Amendment to the Age Discrimination in Employment Act (ADEA) removing the maximum age cap to the Act and abolishing mandatory retirement should not be given immediate effect to a case involving a school teacher and counselor who was involuntarily retired from his employment with school district when said retirement occurred prior to the passing of the Amendment but said Amendment became effective law prior to the issuance of the trial court's final judgment with regard to a multifaceted challenge including consitituion issues to the School District's method and procedure used forcing Petitioner's retirement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners JOHN W. WILLIAMS and WINIFRED WILLIAMS hereby submit the following reply brief addressing those issues first raised in the Brief in Opposition filed by Respondent's TUCSON UNIFIED SCHOOL DISTRICT NO. 1 of PIMA COUNTY and the members of its governing board and its superintendent (herein after collectively "TUSD")

ARGUMENT

THE ARIZONA COURT OF APPEALS INCORRECTLY REFUSED TO APPLY THE 1986 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT RETROSPECTIVELY TO AN ACTION PENDING APPEAL AT THE TIME SAID AMENDMENTS BECAME EFFECTIVE

A. WILLIAMS' action against TUSD was pending within the definition set forth in applicable case law at the time the 1986 amendments to the Age Discrimination in Employment Act became effective.

In opposing WILLIAMS' petition for Certiorari, TUSD has claimed that WILLIAMS' action was not "pending" at the time the 1986 Amendments to the Age Discrimination in Employment became effective, and as such the amendment should not be given effect to WILLIAMS' case as required by this court's

decision in Bradley v. Richmond School Board. 416 U.S. 696 (1974).

U.S. v. Schooner Peggy. 5 U.S. 103 (1801). established the general rule favoring immediate application of new legislation to cases pending appeal. Instead of using the term "pending case" when describing the situations in which to apply the rule. Justice Marshall referred to a period "subsequent to judgment and before the decision of an appellate court." The status of WILLIAMS' case was "subsequent to judgment and before the decision of an appellate court." His case represents precisely the circumstances described in Schooner Peggy. 5 U.S. 103.

Bradley v. Richmond School Board. 416 U.S. 696 (1974). confirms that WILLIAMS is entitled to immediate application of the 1986 Amendment to the ADEA. The basis of the Bradley. 416 U.S. 696 holding is that "a court is to apply the law in effect at the time it renders its decision." Id., at 711. The 1986

Amendment became effective just prior to WILLIAMS filing his Motion for Reconsideration to the Superior Court of Pima County in the State of Arizona. The law as amended makes it illegal to mandatorily retire any person based solely on age. In accordance with Bradley, 416 U.S. 696, the Appellate Court should have applied the law as it existed at the time it rendered its decision in WILLIAMS' case.

TUSD argues that the situation at bar is distinguishable from Schooner Peggy, 5 U.S. 103; Bradley, 416 U.S. 696; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); and United States v. Alabama, 362 U.S. 602 (1960). Those cases are not distinguishable and serve as appropriate precedent requiring immediate application of the 1986 Amendment.

Schooner Peggy, 5 U.S. 103 involved the condemnation of a French vessel. The U.S. Supreme Court applied a convention with France that regulated the condemnation of French

vessels which was consummated subsequent to the lower courts condemnation proceeding. TUSD distinguishes Schooner Peggy. U.S. 103 by stating that the ship had not yet been "definitely" condemned at the time the convention became effective and therefore is distinguishable from the case at bar. In fact, the ship had been condemned by the lower court proceedings. The reason it hadn't been "definitely" condemned was that the condemnation had been appealed. Id., at 108 and 109. WILLIAMS has been mandatorily retired but is presently appealing said retirement. The situation is precisely that before the Court in Schooner Peggy. 5 U.S. 103.

Thorpe. 393 U.S. 268 involved an eviction of a tenant in federally funded housing. After an order had been issued to have the tenant removed from an apartment, a circular was issued providing new procedural requirements for summary eviction. While it

is true that the tenant was a resident while her case was pending appeal, she was subject to an active order for eviction. Her situation was substantially analogous to WILLIAMS.

TUSD in their opposition admits an inconsistency in the court's application of the Bradley, 416 U.S. 696, principle and for that very reason this court should grant the Petition for Certiorari and hear the present case.

B. The procedural requirements of the ADEA are not jurisdictional in nature and should not be allowed to bar WILLIAMS recovery.

TUSD also alleges that WILLIAMS should be barred the benefit of retrospective application of the 1986 Amendment to ADEA because he did not follow the procedural requirements set forth in the act.

The procedural requirements to a claim under the Age Discrimation in Employment Act (ADEA), 29 U.S.C. § 621, et seq. are not

jurisdictional in nature and are, therefore, subject to waiver, estoppel and equitable tolling. Kennedy v. Whitehurst, 690 F.2d 951 (1982); Wright v. State of Tenn., C.A. 628 F.2d 949 (1980). The ADEA Amendment was not in effect at the time the violation by TUSD occurred. It would not be equitable to enforce procedural requirements that might bar WILLIAMS' recovery. If the remedy had been available at the time of the discrimination, WILLIAMS would have filed the necessary charges. The reason he did not was not due to untimeliness, but instead due to the inapplicability of filing said charges. Equity demands a waiver of any requirement not fulfilled due to the circumstances surrounding the appeal. The Amendment did not become effective until January 1, 1987. The case at bar has been under way since January 10, 1984. WILLIAMS' claim cannot be barred for failure to exhaust administrative remedies that were not extant at the time he initially sought

relief from the Court.

Bunch v. U.S., 548 F.2d 336 (9th Cir. 1977), in which a federal employee was denied employment because of age, dealt with provisions that exempted Federal employees from the protection of the ADEA. While the case was pending, amendments were passed extending the protection of the ADEA to federal employees. The Court, following the analysis set out in Bradley v. Richmond School Board, 416 U.S. 696 (1974), found that the amendment should be given immediate application in favor of the Plaintiff in accordance with the ADEA. The government had raised the defense that the Plaintiff should be barred from recovery for failure to comply with the ADEA procedural prerequisites. The Court found a claim could not be barred for failure to exhaust administrative remedies that were nonexistent at the time relief was sought from the Court. Bunch, 548 F.2d 336 at 340. The situation before the Court is the

same as presented in Bunch. 548 F.2d 336. The procedural requirements of the ADEA should be waived and not allowed to bar recovery.

C. Statutory direction favoring Retrospective application of the 1986 amendments to the Age Discrimination in Employment Act should not be limited so to bar WILLIAMS the benefit of said retrospective application.

Section 7 of the amended ADEA reads in relevant part as follows:

> "a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on January 1, 1987, except that with respect to any employee who is subject to a collective bargaining agreement:
> . . .
>
> b) The amendments made by Section 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987."

Sections 3 and 4 of the ADEA deal with Law Enforcement officer and firefighters. only, where Congress expressly limited retroactive application. The specific direction to such a defined area serves as evidence that Congress took affirmative action

in the areas to be limited to prospective application, leaving the inference that immediate application was intended to all areas not involving Law Enforcement officers and firefighters.

The purpose in limiting the immediate application of Sections 3 and 4 through §7(b) was to ensure that the Amendments to ADEA would not serve to destroy an already existing cause of action in effect prior to January 1, 1989. The language used is very specific and contains no mention of an intent to limit the entire act. Sections 3 and 4 are the only sections that might serve to destroy and already existing cause of action through immediate application. If a limitation on the entire act were intended, more general language could have been used limiting the application of the entire Amendment. Upon analysis, the only explanation for Congress being specific in its limitation, is that it intended immediate application to the

Amendment subject to the specific exceptions set out. TUSD tries to limit the implied retroactive application to those cases in which there was an "existing cause of action" arising under ADEA in effect before January 1, 1987. The flaw with its analysis is that none of those situations referenced by TUSD exist. Under TUSD's proposal, the only existing causes of action that would be appropriate for immediate application are those specifically restricted by the language in Section 7(b) of the ADEA; therefore, there would be no instance where immediate application would be available. There is a legislative directive of immediate application of the Amendment in cases such as WILLIAMS.

D. Granting WILLIAMS immediate application of the 1986 amendment to the ADEA would not result in manifest injustice.

In determining whether legislation should be given immediate application, a step-by-step approach is used. The Court first looks to the language of the statute. In this

instance, statutory direction requires immediate application of the ADEA. However, if the Court does not accept this direction, it then looks to whether the immediate application would result in a "manifest injustice." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The first analysis goes to the nature and identity of the parties. TUSD asserts that even though it is not a private party as defined in Bradley, 416 U.S. 696, it should be treated as one for the purposes of this case. Upon analysis of the parties and their relationship, TUSD must be defined as a public entity. Bradley, 416 U.S. 696 recognized the need to categorize a school board as a public entity. Discriminatory action taken by a government-funded entity is an area of great national concern. Application of the rules set out in United States v. Schooner Peggy, 5 U.S. 103 (1801), and Bradley, 416 U.S. 696, requires immediate application of the 1986 Amendment to

the ADEA after analysis of the first prong.

TUSD focuses on what it sees as an inconsistency in directing immediate application of the ADEA to public entities as opposed to private. Bradley, 416 U.S. 696 addressed this issue in pointing out that public entities (in the case of Bradley, 416 U.S. 696, a School Board), should be held to stricter compliance with constitutional or, as in the present case, legislative mandate.

Federal Courts - Manifest Injustice Exception - Used to Deny Retroactive Application of the 1978 Amendments to the Age Discrimination in Employment Act (ADEA), 26 Vill L. Rev. 705 (1980-81) as cited by TUSD, addresses the inconsistency brought up by TUSD. It reasons that the Court in Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980), placed too much emphasis on the status of the parties as private entities. It argues that the Court should have recognized the issue as being of great national concern

and profound national importance and required the Act's immediate application to both private and public entities. Admittedly, this is probably the better approach; but in either case, WILLIAMS passes the "parties" analysis favoring immediate application of the Amendment.

The second analysis is the nature of the rights of the parties with focus on whether the rights are vested and matured. TUSD was required by statute to provide WILLIAMS an opportunity to continue his employment. (See A.R.S. § 38-781.36). TUSD had not developed a plan until after WILLIAMS applied for his continuation. The rights of the parties under this plan could not be deemed vested, when the plan's very existence was in response to the situation at bar. The right that had vested was WILLIAMS' right to apply for continued employment under statute. The rules and standards used to deny his application were reactionary and cannot be deemed vested by

TUSD testing it on WILLIAMS. The rights of the parties had not yet vested and matured so as to find "manifest injustice" as referenced in Bradley.

McCarthy's article, points out another reason that the rights of the parties had not vested. Judge Adams, in his dissenting opinion in Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980), found that the rights of the parties in that case could not be vested or matured absent a ruling by the Supreme Court or the District Court with jurisdiction vesting said rights. The law review article references this language and supports its logic in favor of immediate application. The 1986 Amendment has not conclusively been interpreted by the Courts; as such, the rights thereunder have not vested or matured.

The "nature of the rights" analysis involves the nature of the impact the change in the law has upon the rights of the parties.

The obvious impact on the parties is that WILLIAMS will have his job restored. TUSD states that it is unfair to impose liability for its discriminatory actions that were "lawful" when taken. Any time a law has retroactive effect, it has impact on action previously taken. The purpose in it being retroactive is to correct past wrongs. TUSD has not set forth the actual effect the return of WILLIAMS will have on its operations; as such, no adverse effect must exist. Any inconvenience to TUSD is minimal compared to the right preserved in favor of WILLIAMS, that being the right not to be discriminated against in the work force merely because of age.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of February 1989.

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CERTIFICATE OF SERVICE

I, CATHERINE M. McCRACKEN, attorney for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1989, as per the direction of the Clerk of the Supreme Court, served copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari on the parties hereto as follows:

On the Respondent TUCSON UNIFIED SCHOOL DISTRICT by hand delivering three (3) copies of it to its attorney of record:

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